MAJLIS PEGUAM MALAYSIA & ORS

v.

RAJA SEGARAN S KRISHNAN

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-430-2001]
8 APRIL 2002

CIVIL PROCEDURE: *Action - Discontinuance of - Whether learned judge erred in the exercise of his discretion when he permitted discontinuance of action - Whether relevant considerations were taken into account - Whether defending party was put to great expense and trouble in defending action - Whether appeal against decision of learned judge should be allowed - Rules of the High Court 1980, O. 21 r. 3*

This was an appeal by the appellants against the decision of the learned judge who had allowed the respondent's application to discontinue the suit he had brought against them. The issue was whether the learned judge erred in the exercise of his discretion under O. 21 r. 3 of the Rules of the High Court 1980 ('RHC') when he allowed the respondent's application.

Held:
Per Gopal Sri Ram JCA

[1] The facts of this appeal lie upon the intersection of two important and fundamental principles of our adjectival law. The first is the right of the initiator of an action to withdraw the process by which he invoked the court's jurisdiction. The second is the undoubted right of a defendant to press his case forward to judgment especially where he considers himself to be *dominus litis*. (p 376 h)

[2] A judge exercising his power under O. 21 r. 3 RHC which permits discontinuance of an action has a wide discretion. But it is not an unprincipled discretion. There are important guidelines to follow: (1) that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue; (2) that if the case is at a very advanced stage, care should be taken not to permit discontinuance, and what constitutes an advanced stage depends on the facts and circumstances of each case; and (3) that a judge ought to bear in mind any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue. Therefore, it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines above. (p 377 d-g)

[3] The appellants in exercising their undoubted constitutional right of freedom of speech initiated the holding of a general meeting to discuss the affairs of the judiciary. The respondent undoubtedly exercising his legal rights took the opposite view and obtained an interim injunction that halted the meeting. The appellants failed in their appeal against the grant of the injunction and their application for leave to appeal to the Federal Court also failed. Therefore, the appellants were put to great expense and trouble to test the rights of the respondent to bring the action in the first place. They suffered an order of costs against them at every stage. They came back to the trial court and opposed the granting of the trial of the preliminary issue. They lost there as well. The learned judge did not take into account all these relevant considerations when called upon to exercise his discretion. (p 378 a-f)

[4] The learned judge took into account a policy consideration, namely that the hands at the helm of the judicial vessel had changed and that the issue was no longer available for discussion save at an academic level. That was an irrelevant consideration. The court is concerned with the legal and constitutional rights of ordinary litigants. (p 378 g)

[5] The initial function of this court is one of review only as there is no original discretion vested in this court. But the appellants had demonstrated to a conviction that an error in the exercise of discretion had occurred. This was therefore an appropriate case for this court to intervene and exercise an original discretion of its own. Greater justice would be done if a decision was delivered and the proceedings were permitted to run their ordinary course. At the end of the day, it was justice which was the overriding consideration. For the reasons given, this appeal must succeed. (p 379 c-e)

[Appeal allowed; orders of learned judge set aside; action restored to file and remitted to learned judge for delivery of decision; respondent to pay costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah suatu rayuan oleh perayu-perayu terhadap keputusan hakim yang bijaksana yang membenarkan permohonan responden untuk menghentikan tindakan guaman yang telah diambilnya terhadap mereka. Isu disini adalah sama ada hakim yang bijaksana telah tersilap di dalam menggunakan kuasa budi bicaranya di bawah A. 21 k. 3 Kaedah-kaedah Mahkamah Tinggi 1980 ('KKMT') apabila membenarkan permohonan responden.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Fakta-fakta di dalam rayuan ini adalah berdasarkan kepada pertembungan dua prinsip asas dan penting undang-undang tatacara. Pertama, hak pemula sesuatu tindakan untuk menarik balik proses di mana beliau telah

menggunakan bidang kuasa mahkamah. Kedua, hak tanpa keraguan seorang defendan untuk meneruskan kesnya sehingga ke peringkat penghakiman lebih-lebih lagi sekiranya beliau menganggap dirinya *dominus litis*.

[2] Seorang hakim yang menjalankan kuasanya di bawah A. 21 k. 3 KKMT yang membenarkan pemberhentian sesuatu tindakan mempunyai budi bicara yang luas. Sungguhpun begitu ianya bukanlah budibicara yang tidak berprinsip. Ada garis panduan penting yang perlu dipatuhi: (1) Sekiranya seorang defendan *dominus litis*, kaedah yang biasa ialah untuk tidak membenarkan kebenaran untuk pemberhentian; (2) Sekiranya kes tersebut berada pada tahap lanjut, perhatian lebih perlu diberi untuk tidak membenarkan pemberhentian, dan apa yang ditakrifkan sebagai tahap lanjut bergantung kepada fakta dan situasi tiap-tiap kes; dan (3) Seorang hakim perlu memikirkan sebarang kelebihan interim atau interlokutori yang akan diperolehi oleh plaintif di antara tempoh pengeluaran writ dan masa di mana beliau memohon pemberhentian. Oleh itu kesemuanya bergantung kepada fakta dan situasi tiap-tiap kes selagi tidak tergelincir dari sempadan yang diwujudkan oleh garis panduan di atas.

[3] Perayu-perayu di dalam melaksanakan kebebasan bersuara tanpa keraguan yang diperuntukkan oleh perlembagaan memulakan suatu mesyuarat agung untuk membicarakan hal-hal berkaitan badan kehakiman. Responden dalam melaksanakan haknya di bawah undang-undang mengambil pendirian yang berlawanan dengan perayu dan telah memperolehi suatu injunksi interim untuk memberhentikan mesyuarat tersebut. Perayu-perayu gagal di dalam rayuan mereka terhadap pemberian injunksi tersebut dan permohonan perayu-perayu untuk kebenaran untuk merayu ke Mahkamah Persekutuan juga gagal. Oleh itu perayu-perayu terpaksa melalui perbelanjaan yang besar serta kesulitan untuk mencabar hak-hak responden di dalam memulakan tindakan tersebut. Mereka menanggung perintah untuk kos bagi tiap-tiap peringkat. Mereka kembali semula ke mahkamah perbicaraan dan menentang kepada kebenaran untuk perbicaraan isu awalan. Mereka gagal juga di situ. Hakim yang bijaksana tidak mengambil kira kesemua pertimbangan yang relevan tersebut apabila diminta untuk menjalankan budi bicaranya.

[4] Hakim yang bijaksana mengambil kira pertimbangan polisi, iaitu pihak yang menerajui bahtera kehakiman sudah berubah dan isu tersebut tidak lagi boleh dibincangkan kecuali pada tahap akademik. Itu adalah suatu pertimbangan yang tidak relevan. Mahkamah mementingkan hak undang-undang dan perlembagaan tiap-tiap litigan.

[5] Fungsi utama mahkamah ini adalah hanya untuk kajian semula memandangkan tidak ada budi bicara asal yang diletakkan di mahkamah ini. Tetapi perayu telah mendemonstrasikan bahawa telah berlaku kesilapan

di dalam menjalankan budi bicara. Oleh itu, ini merupakan satu kes yang sesuai bagi campurtangan mahkamah dan menjalankan budi bicara asalnya sendiri. Keadilan akan lebih tercapai jika keputusan diberikan dan prosiding tersebut dibenarkan berjalan seperti biasa. Akhirnya keadilan merupakan pertimbangan yang utama. Di atas alasan-alasan yang diberikan rayuan ini mesti dibenarkan.

[Rayuan dibenarkan; perintah-perintah hakim yang bijaksana diketepikan; tindakan dikembalikan ke fail dan dikemukakan kepada hakim yang bijaksana untuk membuat keputusan; kos dibayar oleh responden.]

Case(s) referred to:
Ambard v. A-G for Trinidad & Tobago [1936] AC 322 ***(refd)***
Fox v. Star Newspaper Co [1898] 1 QB 636 ***(refd)***
O'Neal v. Mann [2000] FCA 1680 ***(refd)***
Overseas Union Finance Ltd v. Lim Joo Chong [1971] 2 MLJ 124 ***(refd)***
Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 10, 127
Rules of the High Court 1980, O. 21 r. 3

For the appellants - Malik Imtiaz Sarwar (Christopher Leong & Charmaine Chow); M/s Sivananthan
For the respondent - DP Vijandran; M/s DP Vijandran & Assocs

[Appeal from High Court, Kuala Lumpur; Suit No: S2-23-93-1999]

Reported by Usha Thiagarajah

JUDGMENT
(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This case has a history. But we are spared from dealing with all of it. So far as this appeal is concerned, the facts fall within a narrow compass.

The plaintiff (the respondent before us) brought an action by writ in the High Court of Kuala Lumpur. In it he claimed a number of declarations. They were all directed at a meeting of the 3rd defendant which the defendants (the appellants before us) intended to convene for the purpose of discussing certain allegations relating to the judiciary which they considered matters of public interest. The plaintiff stopped that meeting by means of an interlocutory injunction. Later, a trial took place before the learned judge in the High Court. It was on issues framed by the plaintiff that encompassed the justiciability of the whole of the relief he had claimed at the foot of the writ. The judge amended the issues and ordered a trial. Oral evidence was led on both sides with the former President of the 1st defendant, namely the 2nd defendant, being subjected to cross-examination on his affidavit. After hearing evidence,

and at the close of the proceedings, the learned judge reserved judgment. Later, on a date fixed for mention of the case, he made a statement in the following terms:

> Gentlemen of the Bar
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> In so far as this case is concerned I have already reached a decision. All it requires is for me to tell you my decision and in the event of an appeal to write my judgment. But before I pronounce my decision I take this opportunity to appeal to both sides to reconsider your positions. In addressing the plaintiff I would urge you to consider the fact that whilst you might have been motivated by the highest of ideals for having filed this suit, you must be aware that subsequent events have so quickly overtaken your desired aims that they now seem superfluous. Let's face it. The *raison d'etre* for your filing this suit, namely the allegations against Y.A.A. Tun Eusoff bin Chin, the former Chief Justice of Malaysia, is no longer an issue as he has since retired. Any perseverance of this goal is now an exercise in futility. Let bygones be bygones.
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> On this score, it must be noted that the present Chief Justice, Y.A.A. Tan Sri Mohamed Dzaiddin bin Haji Abdullah, the Minister in the Prime Minister's Department, Y.B. Dato' Dr. Rais Yatim, and the President of the Bar Council, Tuan Haji Sulaiman bin Abdullah, have all voiced their hope that the new millennium will bring about a change. The joint effort of these three personalities must not go to waste. I now make this impassioned plea to both parties to hang up your gloves and enter the ring of peace.
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> The whole country is reverberating with the sound of the word "unity". It is axiomatic therefore that the Bar ought to lead by example. When I say the Bar, I include the plaintiff herein. Just about a year ago I was to hear the defamation suit filed by Mohammad Sabu (the then MP for Party PAS) and Ibrahim Ali from the UMNO, regarding a reference made by the latter in respect of a khalwat case. On the day fixed for hearing, and with the consent of both solicitors I talked with the plaintiff and the defendant and urged them to show the Nation that notwithstanding their different ideologies, they stood united as a race. The parties asked for a short adjournment and returned within half an hour to inform me that for the sake of Malay Unity the plaintiff was withdrawing his suit with no order as to costs. It was a spontaneous show of respect for each other which no doubt the media had then canvassed.
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> Then I had the occasion to hear yet another defamation suit whereby Mr. Lim Kit Siang, the DAP stalwart and its former MP, sued Y.B. Dato' Seri Lim Keng Yaik, the Minister of Primary Industries. Again on the morning of the hearing and with the consent of counsel for both parties, which included Mr. Karpal Singh for Mr. Lim Kit Siang, I spoke to both litigants of the need to show the country that the Lims were willing to forgive and forget and to show the Nation that for the sake of the community they were united. I was a happy Judge to have recorded a withdrawal of the suit with no order as to costs. The magnanimity of Mr. Lim Kit Siang and the equal show of respect by the Minister were exemplary.

Yet again, the Secretary of the Malay Badminton Association of Malaysia (MBAM) sued four officers of its State branches in defamation. During one of the case management dates I was able to persuade both counsel to speak to their respective clients whether they were prepared to meet with the judge to resolve the matter. The said Secretary had sued the President of the Penang Branch of the MBAM and another official, the Secretary of the Negeri Sembilan MBAM, and the Secretary of the Kelantan Branch. Having fixed a convenient date to enable all parties to travel to Kuala Lumpur I was extremely pleased when after a short adjournment, the parties announced that the matter was settled in the interest of "Malay Unity" (see The Sun/Saturday/September 2, 2002 at page 6).

I am therefore now appealing to you, gentlemen of the Bar, to show this Nation and the world that you are willing to forgive and forget. You, the plaintiff, have won decisively the earlier suit and the decision of the High Court has been affirmed by the Court of Appeal and I understand that leave to appeal to the Federal Court has been refused. I understand you were awarded generous costs all the way. I also ask that as a further show of your desire to put an end to this long drawn out trial, you would deem it fit to withdraw all existing suits against the Bar and the related parties.

You, the Bar, I ask that you do not let your fear of what has been decided by the Courts as against you, to come in between a settlement. Do not reject the olive branch when offered. Do not think that your rights have been curtailed by the judgment of this Court and the Court of Appeal and do not be tempted to use this case to resurrect the same issues. Be mindful too of the fact that in the event the highest Court reaffirms the earlier decision in respect of the other case already decided, your doors to settlement would forever be shut. Instead let the matter rest. If, God forbid, there be another occasion for you to challenge the earlier decision, then so be it. But today, I urge you, be gracious in accepting the hand of friendship offered by the plaintiff. Accept him, if you will as the return of the Prodigal Son. Forgive him for the anguish and acrimony that have been caused.

I urge all parties to join hands to show this Nation and to the world that united we stand and divided we fall. Enemies of the Nation are ramming the portal gates of freedom. Let not the citizens be disunited, you the members of the Bar are the legal brains of the country. Your reasoning, tempered with patience, your understanding, laced with tolerance, must be the hallmark of your very own existence, you cannot be vindictive. You cannot set personal goals. You must act to benefit the Nation.

At a time when this country faces turmoil and tribulation both from within and without, the people look to you, the members of the Bar, for guidance. Be moderate, considerate, compassionate. May God bless you both in your deliberations.

Thank you.

This statement reflects a clear indication that the parties should resolve the differences between them. So, those representing the defendants went back to their masters: the members of the Bar. A general meeting was called. The unanimous view of the floor was that no compromise should be entered into. In the meantime, the plaintiff, no doubt influenced by the sentiments expressed by the learned judge, took a step in the action. He made an application by summons to discontinue the suit. That application came up for hearing before the learned judge. It was strenuously opposed by counsel appearing for the defendants. The learned judge, in a reserved judgment, permitted discontinuance and ordered each party to bear their own costs. The defendants have appealed to us.

In an argument advanced to us this morning, Mr. Malik Imtiaz for the appellants neatly put his case on two grounds which we think we may conveniently summarise without doing any injustice to him. His primary argument is that the learned judge, although conferred with a wide discretion in the matter, exercised it wrongly, that is to say, for the wrong reasons and upon extraneous grounds. The second submission is that the discontinuance itself is an abuse of process of the court which ought not to have been entertained by the learned judge.

Responding to these arguments, Mr. D.P. Vijandran submits that there is nothing extraordinary about what the learned judge did. His case is that there was no error in the way in which the learned judge exercised his discretion and that the only issue is confined to the terms on which the discontinuance ought to have been granted. And upon the latter issue there had been no argument from counsel who had appeared in the court below. Neither has it been a ground of appeal.

So far as abuse of process is concerned, Mr. Vijandran correctly pointed out that the Memorandum of Appeal does not raise this as a ground of complaint. Further, abuse of process has been used by the courts as a ground to strike out notices of discontinuance issued without the leave of the court. In any event, he says, no cogent evidence of collateral purpose has been placed on record.

We perceive the facts of this appeal to lie upon the intersection of two important and fundamental principles of our adjectival law. The first is the right of the initiator of an action to withdraw the process by which he invoked the court's jurisdiction. The second is the undoubted right of a defendant to press his case forward to judgment especially where he considers himself to be *dominus litis*. As in all cases of such nature, where important opposing interests come into conflict, the lines of decision become blurred or at least are not entirely clear.

So far as the present case is concerned, the issue resolves itself into one of discretion. It is encapsulated in O. 21 r. 3 of the Rules of the High Court 1980. That rule reads:

> 3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court, hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim therein be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
>
> (2) An application for the grant of leave under this rule may be made by summons.

Counsel on both sides have rendered much assistance to us on the interpretation of this rule. We are grateful for that. What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O. 21 r. 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.

One of these guidelines is that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v. Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v. Mann* [2000] FCA 1680.

The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which we have referred.

Mr. Vijandran submits that the general rule is that the plaintiff is to be permitted to discontinue the action which he has initiated. In the context of O. 21 r. 3, we would, with much respect, dissent from that submission. We do so for the reasons we have advanced thus far when discussing the guidelines which any judge should respect when exercising his discretion.

We have said that it depends on the facts of each case. What about this case? Now, these are the considerations that present themselves on an objective analysis of the fact pattern.

First, the defendants in exercising their undoubted constitutional right of freedom of speech initiated the holding of a general meeting to discuss the affairs of the judiciary. Here we need not go into the question whether art. 10 of the Federal Constitution prevails over art. 127 or whether art. 127 ought to be read in the restrictive fashion as suggested by Mr. Malik Imtiaz during this morning's argument. Suffice to say that the defendants were exercising their *bona fide* constitutional right. As Lord Atkin observed in *Ambard v. A-G for Trinidad & Tobago* [1936] AC 322, "Justice is not a cloistered virtue" and we are certainly not prepared to say that the conduct of judges should never be discussed at a general meeting of the Bar. Woe beget the day that such a rule is handed down by this court.

The plaintiff undoubtedly exercising his legal rights took the opposite view. He went to court and obtained an interim injunction that halted the meeting. We must say a word here, which we did not mention when reciting the facts. There was an appeal preferred against the grant of interlocutory injunction which failed. An application to the Federal Court for leave to appeal also failed. In other words, the defendants were put to great expense and trouble to test the rights of the plaintiff/respondent to bring the action in the first place. They suffered an order of costs against them at every stage. They came back to the trial court and opposed the granting of the trial of the preliminary issue. They lost there as well. They fought on the facts and law at the trial of the preliminary issue tooth and nail. They never relented. To be then told after undergoing all this trouble that they are not entitled to have judgment delivered, not to know their ultimate fate, is in our view adding insult to serious injury.

These are the relevant considerations which the learned judge ought to have taken into account when called upon to exercise his discretion in one way or the other. But he did not do that.

With respect, what the learned judge did was to take into account a policy consideration, namely that the hands at the helm of the judicial vessel had changed and that the issue was no longer available for discussion save at an academic level. That in our view is an irrelevant consideration.

We are here concerned with the legal and constitutional rights of ordinary litigants. In our view, there is nothing extraordinary or special in this case so far as the exercise of discretion under O. 21 r. 3 is concerned.

Mr. Vijandran has correctly drawn our attention to a passage in the judgment of the case of *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn. Bhd.* [1996] 3 CLJ 858. The role of this court in an appeal on discretion was there summed up as follows (at p. 874 of the judgment):

> We must say at once that the rules of Court confer upon the High Court a wide discretion upon the question whether an action should be discontinued. The rules also confer upon the Court a wide power in relation to the kind of orders it may make upon an application for leave.
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> Now, it is settled law that in an appeal against the exercise of discretion by a Judge, the initial function of this Court is one of review only, there being no original discretion vested in this court. Only after an appellant is able to demonstrate to a conviction that this case comes within one or more of those categories of cases in which appellate interference is warranted does this Court become entitled to exercise a discretion of its own.

We take this opportunity to affirm that proposition. The initial function of this court is one of review only. But the appellants have demonstrated to a conviction that an error in the exercise of discretion has indeed occurred. This is therefore an appropriate case for us to intervene and exercise an original discretion of our own. We think that greater justice will be done if a decision is delivered and the proceedings are permitted to run their ordinary course. At the end of the day, it is justice which is the overriding consideration. And justice is the master we all serve with humble obedience.

For the reasons already given, this appeal must succeed. The conclusion that we have arrived at therefore makes it unnecessary for us to go into the second argument advanced by Mr. Malik Imtiaz namely, the issue of abuse of process. But we must not be misunderstood to say that that argument has no merit. It is just that it is not necessary for us to deal with it.

The appeal is accordingly allowed. The orders of the leaned judge are set aside. The action is restored to file and is remitted to the learned judge for the delivery of decision on a date convenient to him. There is no extraordinary reason why costs should not follow in the ordinary way. The respondent will therefore pay the appellants' costs here and in the court below in the matter of this application. This is unfortunate because the suggestion to discontinue came from the learned judge but we are bound by principle to exercise the discretion in the matter of costs in the ordinary way. The deposit is to be refunded to the appellants.

Before we conclude, we must express our gratitude to counsel on both sides without whose able assistance, this *ex tempore* judgment would not have been possible.